UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COMMENTS FROM THE COUNCIL ON LABOR LAW EQUALITY

REGARDING
NOTICE OF PROPOSED RULEMAKING—THE JOINT EMPLOYER STANDARD
RIN 3142-AA13

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I. INTRODUCTION

On behalf of the Council on Labor Law Equality ("COLLE"), we are pleased to submit these comments in response to the National Labor Relations Board's ("Board" or "NLRB") Notice of Proposed Rule Making ("NPRM") published at 83 FR 46681 (September 14, 2018). COLLE supports the Board's proposed rule, which would eliminate the confusion *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 2018 WL 6816542, at *18 (D.C. Cir. Dec. 28, 2018) left in its wake and, instead, provide clear and principled standards for resolving whether two separate entities co-determine the essential terms and conditions of employment for a group of employees sufficient that they should be deemed joint employers under the National Labor Relations Act (the "Act" or "NLRA").

COLLE is a national association of employers that exists to comment on and assist in the interpretation of the law under the NLRA. COLLE's single purpose is to follow the activities of the Board and the courts as they relate to the NLRA. Through the filing of *amicus* briefs and other forms of participation, COLLE provides a specialized and continuing business community effort to maintain a balanced approach — in the formulation and interpretation of national labor policy — to issues that affect a broad cross-section of industry. COLLE has participated as *amicus curiae* in numerous cases before the NLRB.

COLLE's members are large, national employers, many of whom rely on a variety of suppliers and contractors to operate their businesses. Consequently, the Board's joint employer standard is of special importance to them. *Browning-Ferris* disrupts long-standing relationships between COLLE's members and their suppliers and contractors by fundamentally altering the legal underpinnings of those relationships. Those relationships are arms-length business transactions not intended to create joint employer relationships or impose the liabilities and obligations that inure to joint employers under the NLRA. Since *Browning-Ferris*, the Board

has left COLLE's members (and all of the other Act's constituents and the NLRB's regional officers) guessing how it will interpret the vague "standard" it articulated in that case. The uncertainty *Browning-Ferris* created undermines stability in labor relations, which is a primary responsibility of the Board to provide.

Moreover, the D.C. Circuit Court of Appeals recently exacerbated that uncertainty in its "confused and confusing" opinion reviewing *Browning-Ferris*. 2018 WL 6816542 *Id.* at *29 (D.C. Cir. Dec. 28, 2018) (Randolph, J., dissenting opinion). Judge Randolph's characterization cannot legitimately be disputed, as demonstrated by the diametrically opposite conclusions numerous legal commentators and publications have reached about the Court's holding. Depending on the legal publication, the D.C. Circuit had either "approved" *Browning-Ferris*'s standard or "scuttled" it. While commentators often have different perspectives about the impact of a particular court decision, they seldom disagree about what the court's holding was. If sophisticated legal publications and labor law practitioners cannot agree about what the court actually held and—consequently—what the joint employer standard is *now*, no reasonable person can legitimately claim that the *Browning-Ferris* "standard" is clear.

Stability in labor relations can be achieved only by clarity and consistency. The Board's proposed rule would provide both. It would ground the NLRA's joint employer standard in decades of jurisprudence while providing additional clarification of that standard, avoiding the economic turmoil that will otherwise occur as businesses react to the nebulous *Browning-Ferris* "standard" and feel constrained to significantly restructure operations and terminate arms-length relationships with vendors and customers to minimize the risk of being deemed joint employers. Thus far, that turmoil has been delayed while *Browning-Ferris* was under review by the D.C. Circuit and the Board wrestled with it in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLB No. 156 (Dec. 14, 2017), *overruled by Hy-Brand Industrial Contractors, Ltd.*, 366 N.L.R.B. No. 26

(Feb. 26 2018), and the fallout from that decision. If the Board fails to adopt the proposed rule, employers can no longer delay the difficult decisions they must make based on a thoroughly muddy ground the Board created, and which the D.C. Circuit has turned into a marsh, in *Browning-Ferris*. Without the Board's adoption of the proposed rule, those decisions are likely to cause significant disruption and harm—not just to businesses—but to millions of workers they employ.

II. SUMMARY OF COMMENTS

The following points summarize COLLE's comments on the proposed rule:

A. The proposed rule is necessary because the current joint employer standard is unworkably vague; and, although it can be strengthened by adding clear definitions of its key terms, even without such definitions the proposed rule would provide certainty and stability crucial to the NLRA and its constituents by re-adopting the "direct and immediate" control standard that the Board and courts consistently applied and explicated for more than 30 years.

For decades, the Board had applied a clear standard that met the common law's requirements and satisfied the purposes of the NLRA. The Board first articulated that standard in *TLI, Inc.*, 271 NLRB 798 (1984) and *Laerco Transportation & Warehouse*, 269 NLRB 324 (1984). It further clarified that standard in subsequent decisions, giving a cogent basis for businesses to structure their operations and for employees and unions to evaluate and direct their organizing efforts. Employers both small and large have relied upon the clarity and stability that standard provided to structure their companies and operations, contributing to the substantial expansion of our national economy.

Without any empirical evidence demonstrating a need to change that settled standard, *Browning-Ferris* overturned 30 years of precedent and replaced it with a test that provides no standard at all, but a vague set of considerations that is inconsistent with the common law, unworkable in practice, and damaging to labor relations stability. The *Browning-Ferris* majority held that indirect and reserved control can alone be sufficient to render two separate companies joint employers under the NLRA, but the majority refused to explain how those factors should be

weighted or applied. Consequently, employers have been left without guidance as to whether and how they needed to modify or initially structure their business transactions to avoid being deemed joint employers under the NLRA. *Browning-Ferris*'s "standard" is so vague that, apart from failing in its purpose under the NLRA, it raises serious due process concerns if used (as it certainly would be) to impose unfair labor practice liability.

By returning to and providing additional clarification of its historical standard, the Board would eliminate the anxiety that has prevailed in the employer-community since *Browning-Ferris* and avoid the serious disruption and harm that, thus far, have been delayed while that decision was under review by the D.C. Circuit and the Board wrestled with *Hy-Brand* and its fallout. The proposed rule provides a clear and reasonable standard, returns stability in this area of labor relations, and ensures employees, employers, and unions alike can plan and act with reasonable certainty that they understand whether a joint employment relationship exists.

B. Unlike the *Browning-Ferris* test, the proposed rule is fully consistent with the common law and the language, legislative intent and fundamental policies of the NLRA.

Browning-Ferris's joint employer "standard" is based on the majority's fatally flawed misinterpretation of the common law. The *Browning-Ferris* majority also failed to fully appreciate the common law of agency's limitations when used to determine joint employer status under the NLRA. Certainly, the common law establishes the outer limit of what entities *can* be deemed joint employers, but its agency test was not developed by courts to resolve joint employment questions under any statute, much less, under the NLRA. The common law of agency's test grew out of courts' struggles with vicarious liability issues. Understandably, as it was a tool developed for very different purposes, the common law agency's multi-factor test does not provide the certainty the NLRA requires of the Board, nor does it clearly explain what entities *should* be deemed *joint* employers under the NLRA.

C. Rulemaking is the most appropriate means for the Board to undo the uncertainty and confusion left in *Browning-Ferris*'s wake.

Fostering stability in labor relations is a primary Board responsibility, yet *Browning-Ferris* undermined the certainty that had existed for decades regarding joint employer determinations and substituted confusion and instability in its place. Notice and comment rulemaking is the best method for resolving issues under the NLRA that are fundamental and have broad ramifications. Comments, such as these presented by COLLE, ensure that the final rule is fully informed and clear so parties are not left guessing about what amount or types of indirect and/or retained control might result in the Board finding of joint employment. Rulemaking is especially appropriate where, as here, the Board's recent jurisprudence has oscillated and, more than three years after the *Browning-Ferris* decision, the Board has not provided further elucidation of the type of indirect or retained control renders one company a joint employer of another's employees. Without detailed guidance from the Board comparable to that articulated in the proposed rule, employers are unable to reasonably make plans for organizing and operating their businesses.

III. COMMENTS TO THE PROPOSED JOINT EMPLOYER RULE

A. COLLE Urges the Board to Adopt the Proposed Rule and Return to the "Direct and Immediate" Control Joint Employer Standard to Restore the Certainty and Stability that Standard Had Provided for Decades.

COLLE exists specifically to assist in the development and application of the NLRA and values the proposed rule's clear standard for resolving whether two entities sufficiently co-determine essential terms and conditions of employment over a relevant group of employees to be deemed joint employers under the NLRA. Because the joint employer standard is of crucial importance under the NLRA and because of its significant impact on our national economy, COLLE filed an amicus brief when the Board requested amici briefs in the *Browning-Ferris* case. In that brief, COLLE urged the Board to retain its historical "direct and immediate" standard, and it renews

that position in these comments. The Board's many constituents need a clear standard that comports both with the common law and the purposes of the NLRA: the proposed rule provides just that.

The proposed rule in large measure returns the Board to the "direct and immediate" control standard, while clarifying it in light of our changing economy by providing specific examples regarding increasingly-common situations the Board has not necessarily had the opportunity to address before. Moreover, by conditioning joint employer status on the actual exercise of *substantial* direct and immediate control over *essential* employment terms and conditions, the Board is re-affirming and clarifying its pre-*Browning-Ferris* joint employer standard to ensure that business entities are not forced into artificial relationships as "joint employers" with others they deal with only in arms-length transactions.[1]

The standard articulated by the Board in *Laerco* and *TLI* was clear, rational and withstood the test of time for over 30 years. Indeed, the Board's direct control standard was "settled law" from 1984 until August 27, 2015. *See Airborne Express*, 338 NLRB 597, n.1 (2002). Although Member McFerran's dissent from the NPRM expressed concern that "the majority's proposed inclusion of a 'direct and immediate' control requirement in the joint-employer standard would hardly result in an easy-to-apply test" because "the proposed rule, if ultimately adopted by the Board, will reveal its true parameters only over time, as it is applied case-by-case through adjudication," joint employer issues are always resolved on a case-by-case basis analyzing the particular facts in each case.

However, Member McFerran's criticism fails to appreciate that we have already had over 30 years of adjudication to help clarify the parameters of the "direct and immediate" control

[1] COLLE believes the Board can and should further strengthen the rule by defining its key terms. COLLE urges the Board to adopt the definitions it has proposed, below.

standard[2] It is not the proposed rule, but the *Browning-Ferris* test that is unworkably vague. As the D.C. Circuit Court of Appeals observed in its recent decision reviewing *Browning-Ferris*, the Board utterly failed to provide meaningful guidance about what indirect control demonstrated the type of control the common law demands. *Browning-Ferris* ("[T]he Board provided no blueprint for what counts as 'indirect' control. . . . The Board's employment of the indirect-control factor, in other words, requires it to erect some legal scaffolding that keeps the inquiry within traditional common-law bounds.").

Presaging the D.C. Circuit's criticism, numerous commentators had noted that the *Browning-Ferris* "standard" could apply to almost any business situation given the Board's failure to articulate where in the future it might draw the line. Some commentators observed that *Browning-Ferris* would have been far less problematic had the Board provided some explanation about what indirect or retained control would result in a joint employer determination. As the D.C.

[2] *See, e.g.*, *Aldworth Co*., 338 NLRB 137, 139-40 (2002) (affirming ALJ's finding of joint employer relationship because "[b]ased upon a thorough review of the record, the judge determined that Respondents Aldworth and Dunkin' Donuts together share control over the hiring, firing, wages, benefits, discipline, supervision, direction and oversight of the truck drivers and warehouse employees and thereby meet the standard for joint employer status"); *Mar-Jam Supply Co.*, 337 NLRB 337, 342 (2001) (affirming finding of joint employment after analyzing all terms and conditions of employment and finding that putative employer directly hired and fired employees, solely supervised and directed the employees with regard to work assignments, time, attendance and leave, and disciplined the employees); *C. T Taylor Co*., 342 NLRB 997, 998 (2004) (affirming finding of no joint employment where none of essential terms and conditions of employment were controlled by putative employer); *Mingo Logan Coal Co.*, 336 N.L.R.B. 83, 95 (2001) (stating that the putative joint employer meaningfully affected all five essential terms and conditions of employment); *Villa Maria Nursing & Rehab. Ctr., Inc.*, 335 NLRB 1345, 1350 (2001) (affirming finding of no joint employer relationship where "Villa Maria does not have any authority to hire, fire, suspend or otherwise discipline, transfer, promote or reward, or lay off or recall from layoff ServiceMaster's employees. Villa Maria does not evaluate them or address their grievances."); *Windemuller Elec., Inc.*, 306 NLRB 664, 666 (1992) (affirming ALJ's finding of joint employment based on facts that putative joint employer shared or co-determined hiring, firing, discipline, supervision and direction); *Quantum Resources Corp*., 305 NLRB 759, 761 (1991) (affirming joint employer finding and specifically adding to Regional Director's decision that FP&L's control over hiring, discipline, discharge and direction "[t]ogether with the close supervisory relationship between FP&L and [contract] employees ... illustrate[s] FP&L's joint employer status"); *D&S Leasing, Inc.*, 299 NLRB 658, 659 (1990) (finding joint employment based on facts that putative joint employer shared or co-determined the hiring, firing, discipline, supervision and direction of contract employees); *G. Heileman Brewing Co.*, 290 NLRB 991, 1000 (1988) (affirming joint employer finding based on fact that G. Heileman shared or co¬determined all five essential terms and conditions of its contract employees' employment, and in addition negotiated directly with the union); *Island Creek Coal*, 279 NLRB 858, 864 (1986) (no joint employer status because there was "absolutely no evidence in this record to indicate that the normal functions of an employer, the hiring, firing, the processing of grievances, the negotiations of contracts, the administration of contracts, the granting of vacations or leaves of absences, were in any way ever performed by [the putative joint employer])."

Circuit noted, such explanation might have brought *Browning-Ferris* within the confines of the common law. But *Browning-Ferris* failed to provide any standards for how to apply its vague terms.

Before *Browning-Ferris*, the Board's long-standing and consistent application of precedent since *TLI* and *Laerco* established a workable, consistent, and predictable standard that companies have applied in structuring their relationships with their suppliers and contractors. The importance of such consistency cannot be overstated; indeed, the desire for certainty in labor law was an animating force of the NLRA. When introducing what became the NLRA, Senator Wagner expressed the importance of predictability in the law: "[E]mployers are tremendously handicapped when it is impossible to determine exactly what their rights are. Everybody needs a law that is precise and certain." 79 CONG. REC. 2371 (daily ed. Feb. 21, 1935) (statement of Sen. Robert F. Wagner).

In reversing long-standing precedent, *Browning-Ferris* created instability, unpredictability and uncertainty. The "standard" it adopted is so vague that it fails to meet the minimum requirements of due process, as it does not give employers fair notice of when their ordinary business arrangements might subject them to liability as joint employers. As the Supreme Court has opined, "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc*., 567 U.S. 239, 253 (2012) (holding due process required fair notice even when regulations imposed no criminal penalty or monetary liability). With respect to the joint employer standard under the NLRA, due process demands that the Board's test be clear enough that everyone can reasonably ascertain to whom it applies. *Browning-Ferris*'s standard, however, falls far short. It allows the Board to make its determinations with no meaningful constraints. Any entity that depends upon another has sacrificed some modicum of at least potential control, so if the Board wishes to find it to be a joint employer, *Browning-Ferris* gives it the "standard" to do so.

Apart from the due process concerns it creates, the nebulous *Browning-Ferris* "standard" threatens to disrupt existing relationships between companies and their suppliers and contractors, which have been structured, in part, based on existing law. That disruption could cause significant harm not only to the parties to these relationships, but to the economy as a whole. Because the reversal of such long-standing, well-settled precedent under the NLRA can cause such significant economic disruptions, the Board should have been far more cautious in tossing 30 years of precedent to adopt any different standard—much less one that is unworkably vague. *C.f., Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due."); *SEIU Local 32B,I v. NLRB*, 647 F.3d 435, 442 (2d Cir. 2011) ("Where the Board 'departs from prior interpretation of the NLRA without explaining why that departure is necessary or appropriate,' the Board will have exceeded the bounds of its discretion."); Harold J. Datz, *When One Board Reverses Another: A Chief Counsel's Perspective*, *1* AM. U. LAB & EMP. L.F. 67, 71, 82-83 (2011) (warning of the dangers of reversing Board precedent and recommending that it only be done in compelling circumstances).[3]

[3] *See, e.g.*, *SEIU Local 32BI v. NLRB*, 647 F.3d 435, 443 (2d Cir. 2011) (finding that supervision which is "limited and routine" in nature does not support a joint employer finding, and that supervision is generally considered "limited and routine" where a "supervisor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work.") (citation omitted); *AT&T v. NLRB*, 67 F.3d 446, 451 (2d Cir. 1995) (finding no joint employment where only one indicium of control (participating in the collective bargaining process) existed and there was no direct and immediate control over hiring and firing, discipline, supervision or records of hours, payroll, or insurance); *Holyoke Visiting Nurses Ass'n v. NLRB*, 11 F.3d 302, 307 (1st Cir. 1993) (finding joint employer status where the putative joint employer had "unfettered" power to refuse to hire certain employees, monitored the performance of referred employees, assumed day-to-day supervisory control over such employees, gave such employees their daily assignments, reports, supplies, and directions, and held itself out as the party whom employees could contact if they encountered a problem during the work day); *Carrier Corp. v. NLRB*, 768 F.2d 778, 781 (6th Cir. 1985) (finding joint employer status where the putative joint employer "exercised substantial day-to-day control over the drivers' working conditions," was consulted "over wages and fringe benefits for the drivers," and "had the authority to reject any driver that did not meet its standards" and to direct the actual employer to "remove any driver whose conduct was not in [the putative joint employer's] best interests.")

The stability and predictability provided by the Board's pre-*Browning-Ferris* "direct and immediate" standard allowed thousands of businesses, large and small, to structure their business relationships in a sensible and optimal fashion, subcontracting discrete tasks to other companies with specialized expertise to provide services that would otherwise be far more difficult or costly. At the same time, that "direct and immediate" standard did not deny any employee the right to union representation as granted by the NLRA, nor prevent any union from bargaining with the employer directly involved in controlling the essential terms and conditions of employment in a workplace. Therefore, COLLE fully supports a return to that "direct and immediate" standard and urges the Board to adopt the proposed rule.

Moreover, COLLE appreciates and supports the Board's effort in the proposed rule to provide multiple examples of business situations and operations to further clarify the traditional "direct and immediate" standard. These examples are extremely helpful for the Board's constituents in aiding them to evaluate common business interactions and providing them further detail as to how the test applies. These examples are the type of additional "scaffolding" that the D.C. Circuit concluded was missing in *Browning-Ferris*. These examples allow the Board to address multiple common business situations now and advise whether they satisfy the proposed rule's standard, rather than leaving them unresolved to some indefinite future time while the NLRA's constituents are left guessing in the meantime.

COLLE supports the proposed rule, but as the General Counsel observed in comments responding to the NPRM, it can be strengthened by including definitions of its key terms. Dec. 10, 2018 comment from NLRB General Counsel Peter Robb to the Board, *available at* https://www.regulations.gov/document?D=NLRB-2018-0001-8476 (last visited Jan. 28, 2019). In particular, the rule should identify what employment terms and conditions are "essential," what constitutes "substantial" control, and the types of control that should not be deemed probative of

joint employer status. COLLE concurs with the definitions proffered by the Restaurant Law Center ("RLC") in its comments, *available at* https://www.regulations.gov/document?D=NLRB-2018-0001-25771 (last visited Jan. 28, 2019). In particular, COLLE urges the Board to include in the final rule the following in a "Definitions" section:

- **Essential terms and conditions of employment**:

"Essential terms and conditions of employment" shall mean the hiring, promotion, discipline and discharge of employees; determination of individual employee rates of pay and benefits; engaging in regular, day-to-day supervision of employees; and directly assigning particular employees their individual work schedules, positions and tasks."

- **Substantial control affecting essential terms and conditions of employment:**

Substantial control affecting essential terms and conditions of employment" shall not include any of the following: actions, policies, training or programs intended:

(1) by any entity to require compliance by its suppliers, vendors, subcontractors or other entities with whom it has a business relationship with any federal, state or local law, regulation or other legal requirement;

(2) by any franchisor to require, maintain or enforce the standardized services, products, processes or product delivery of the business system to which the franchisee has agreed to participate;

(3) by any entity to require, implement or administer any social responsibility code or policy, including safety and security policies, with respect to suppliers, vendors, subcontractors or other entities with whom it has a business relationship;

(4) by any franchisor to require, maintain or enforce the brand protection standards required of persons who enter into franchising agreements with such franchisor;

(5) by any entity to require and establish time parameters when the activity or work in question is to be performed;

(6) by any entity to require and establish quality service or outcome standards for any activity or work to be performed;

(7) by any entity to require an individual to wear any type of uniform or any other type of identification that mentions in any manner the entity's brand;

(8) by any entity to require, maintain or enforce product, brand or reputational protection standards for its products, goods or services;

(9) to implement third party delivery and courier services, or technology-based shared staffing applications (including, but not limited to, insurance, training, financing and leasing services);

(10) by any association whose primary purpose is to negotiate and administer multi-employer collective bargaining agreements on behalf of its employer-members; and

(11) by any entity to make available optional training programs or optional management and operational tools, including but not limited to business consulting and data analysis, that a franchisor or other entity offers to franchisees or other contracting entities.

- **Retained Control:**

Retained or reserved but unexercised control over essential terms and conditions of employment, and/or the exercise of routine, arms-length, indirect control over essential terms and conditions of employment, shall not alone be dispositive of joint employer status."

These definitions largely mirror those proposed by the RLC in the comments it submitted in response to the NPRM. By including these definitions in the final rule, the Board would provide all of the Act's constituents with clear and reasonable standards and ensure the Board achieves the fullest benefits that rulemaking allows.

B. The Proposed Rule is Consistent with the Common Law, But the Common Law's Agency Test Does Not Provide Meaningful Guidance for Resolving Joint Employer Issues, Particularly Given the Unique Purpose of the NLRA.

In the NLRA, Congress did not address the concept of joint employment and, in fact, assumes an appropriate unit of employees has only one employer. The evidence that Congress requires a single employer entity is clear and pervasive throughout the NLRA. For example, the NLRA allows the Board to certify as an appropriate bargaining unit only a group of employees working for a single employer: "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be ***the employer*** unit, craft unit, plant unit, or subdivision thereof . . . ." 29 U.S.C. § 159(b) (emphasis added); *see also*, 29 U.S.C. § 159(a) (confirming represented employees' right to present grievances "to their employer"); 29 U.S.C. § 158(b)(4) and § 158e (prohibiting secondary boycotting of any entity other than "the employer"

with whom the employees have a labor dispute); *Oakwood Care Ctr.*, 343 NLRB 659 (2004) (holding the NLRA requires the Board to certify only single employer units, absent consent of all employers).

Obviously, had Congress intended to allow for the certification of a unit of workers with different employers, it would have done so by simply adding the two words, "or employers," to Sections 9(a) and (b). To overcome the limitation posed by the NLRA's clear terms, the Board, with judicial approval, developed the fiction of a "joint employer" entity. That fiction, as the Board applied it historically, may be consistent with Congressional intent. But the fiction that two wholly separate and independent companies constitute a "joint employer" entity cannot be legitimately extended as far as the Board applied it in *Browning-Ferris* simply because one entity has some degree of control over the other. Such a definition is inconsistent with any reasonable interpretation of what Congress meant by using the singular term, "the employer," in the NLRA.

Unfortunately, when it adopted the NLRA in 1935, Congress did not define "employer," and it has not done so since. Nor has the Supreme Court defined that term under the NLRA. However, both Congress and the Court have made clear that an employment relationship under the NLRA requires direct supervision of the putative employees. *Allied Chemical & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 167-68 (1971). In *Allied Chemical*, the Court rejected the Board's attempt to expand the definition of the term "employee" beyond its ordinary meaning, observing that:

> It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. . . . "*Employees" work for wages or salaries under direct supervision*. . . . It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings, but ordinary meanings.

Id. at 167-68 (quoting H.R. Rep. No. 245, at 18, 80th Cong., 1st Sess. (1947) (emphasis in original)). Axiomatically, if an "employee" under the meaning of the NLRA is someone who works under direct supervision, his or her employer is the entity that provides the direct supervision. To conclude otherwise, as *Browning-Ferris* did and the D.C. Circuit suggests is possible, is contrary to the ordinary meaning of the employer-employee relationship—and the common law—as it existed when the NLRA was adopted in 1935 and amended by the Labor Management Relations Act in 1947 ("Taft-Hartley" or "LMRA"). *Browning-Ferris* adopted a "far-fetched" definition of "employer" that dramatically expands what Congress intended by abandoning the fundamental touchstone of an employer-employee relationship; namely, direct control of the employee. *Cf. NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (6th Cir. 1995) ("The deference owed the Board . . . will not extend, however, to the point where the boundaries of the Act are plainly breached.").

Given that *Browning-Ferris* purported to base its standard on the common law, it is important to examine and define what that law was in 1935 when Congress adopted the NLRA. Examining the common law of that time demonstrates that the *Browning-Ferris* majority misconstrued both the common law's agency test and its history. The common law test the Board relied upon in *Browning-Ferris* is the multi-factor test articulated in the Restatement (Second) of Agency, § 220. The Restatement makes clear that the touchstone of the common law test is "control over the manner and means by which" a particular individual fulfills its obligations to the putative employer, not the potential or indirect control it might have. *Id.*

Moreover, courts developed the common law test principally to guide the resolution of whether defendant-entities were liable to third parties for torts committed by individuals acting on their behalf, and it cannot be understood without recognizing the historical context in which it evolved. *Cf.* Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 Berkley J. Emp. & Lab. L. 295 (2001) (summarizing historical

development of various tests for determining employee status and noting the most important purpose that the common law's "control test" served in its early development was to protect third parties from the consequences of a worker's negligence). Indeed, the first version of the Restatement, which restated the common law just two years before Congress adopted the NLRA, used the term "servant" rather than "employee," and focused exclusively on the principles that helped establish a master's liability for the wrongs of one person (its servant) as distinguished from the wrongs of another (independent contractor) for which it was not liable. Restatement (First) of the Law of Agency, §220, cmt. c (1933).

Although the common law was later restated in 1958 as a multi-factor test applicable beyond questions of *respondeat superior* liability, even then it was not a restatement of court decisions interpreting federal labor and employment laws. At the time (1958), there simply were too few federal labor and employment laws to interpret and the one with the longest history, the Fair Labor Standards Act ("FLSA"), 29 U.S.C.A. § 201 et seq., came with a unique and expansive definition of "employer" provided by Congress (i.e., "any person acting directly or indirectly in the interest of an employer in relation to an employee"). *Id.* at § 203(d).

Thus, the fundamental problem with *Browning-Ferris*'s attempt to rely on the common law of agency's multi-factor test is that it is using a tool for a use it was not intended. As the Supreme Court has recognized, the common law's test has limited value when used for purposes other than sorting employees from independent contractors. *Clackamus Gastroenterology Assocs. v. Wells*, 538 U.S. 440, n.5 (2003). In *Clackamus*, the Court came as close as it ever has to defining the term "employer" under a federal labor or employment law—and it concluded that the common law factors for determining whether an individual is an employee under the federal anti-discrimination law it was considering, were not helpful. Specifically, the Court concluded the common law was:

> not directly applicable to this case [under the Americans with Disabilities Act] because we are not faced with drawing a line between independent

> contractors and employees. Rather, our inquiry is whether a shareholder-director is an employee or, alternatively, the kind of person that the common law would consider an employer.

Id. For the same reason, the common law factors are not directly probative of *joint* employer status. Because courts developed the multi-factor common law test to separate independent contractors from employees, many of the test's factors, while helpful to serve the purpose for which the test was developed, provide no guidance in determining whether individuals who are concededly employees of some entity are also some the employees of another. Indeed, many of the factors are valuable only when determining if an individual is an employee rather than an independent contractor, including:

1) whether the individual is engaged in a distinct occupation or business;

2) whether the work is usually done under the direction of the employer or by a specialist without supervision;

3) the skill required in the particular occupation;

4) the length of time for which the person is employed;

5) whether the parties believe they are creating the relation of master and servant;

6) whether the principal is in business; and

7) the method payment, whether by the time or by the job.

By the time a question of joint employment status arises, each of those factors is already going to have been answered in a manner that establishes the individuals at issue are employees, not independent contractors. Consequently, they are largely irrelevant to determining whether an entity other than their employer should be deemed to jointly employ them. *Browning-Ferris* utterly failed to explain how those factors would help in any way to resolve the issue of joint employer status under any labor or employment law, much less, the NLRA.

The Supreme Court, however, made clear that under the common law employees work for wages under direct supervision. The Board's historical test, which required that a joint employer

actually exercise "direct and immediate" control over the other employees' meaningful terms and conditions of employment encapsulated the Supreme Court's summary of the common law, and the proposed rule, once again, will ground the Board's joint employer standard in that common law.

1. The Joint Employer Standard under the NLRA Must Recognize its Unique Purpose.

The NLRA is fundamentally different from most other labor laws because its focus is not on the rights of an individual worker, but on the rights of groups of workers (and the rights/obligations of their employers and the unions that seek or obtain the right to represent them). To superficially contend that the multi-factor test developed to sort independent contractors from employees controls or even is helpful for an entirely different purpose—determining joint employer status under the NLRA—is inconsistent with, rather than expressive of, the common law and inimical to the NLRA's purposes. Indeed, even a test that might be appropriate for making joint employer determinations under other federal employment laws might not be appropriate for making those determinations under the NLRA.

Consider, for example, a group of employees who work for a company (the "statutory employer") that has contracted to perform certain work for another ("contracting company") on the contracting company's property. Assume those employees' statutory employer is solely responsible for hiring, firing, disciplining, regularly supervising and directing them (as was the case in *Browning-Ferris*). But on a couple occasions over a multi-year period, the contracting company observes employees engaging in serious misconduct, such as sexually harassing one of the contracting company's employees (or drinking on its premises, as was the case in *Browning-Ferris*). The contracting company notifies the statutory employer and, depending on the gravity of the misconduct, recommends (as was the case in *Browning-Ferris*) that the statutory employer appropriately handle the situation. Under Title VII of the Civil Rights Act, the contracting employer would most certainly be well-advised if not required to do more than make a recommendation, it

would tell the statutory employer that its employee was not again welcome on its property. Under some federal anti-discrimination laws, we could hypothesize facts that might render the contracting company liable as a joint employer; *i.e.*, the employee accused of harassment had worked at the contracting company's location for an extended time, the statutory employer provided services at no other nearby location (and consequently had no option but to terminate the employee once his access to the contracting employer's premises was revoked), *and* the contracting company had reported the situation to the statutory employer and revoked that employee's access rights solely because of animus it harbored based on his race. *Perhaps* in that situation, the contracting company might be deemed a joint employer of the statutory employer's employee under Title VII for purposes of any individual race discrimination claim. But if that was the only incident where the contracting company had taken such action, or one of a couple similar actions, over a five year period of time, should the contracting company be deemed a joint employer under the NLRA? Certainly not.

Isolated instances of control provide inadequate evidence to demonstrate how the contracting company actually controls the *group* of the statutory employer's employees. Only if the contracting company actually exercises substantial direct and immediate control over the employees, if its regularly supervises and directs the employees (and its supervision and direction is not merely routine), and if the control is exercised over essential terms and conditions of employment, should there be a finding of joint employment under the NLRA. And that's exactly the test the Board has proposed in the NPRM.

In fact, the *Browning-Ferris* majority recognized that the common law of agency, in itself, could not resolve joint employer issues under the NLRA: it had to adopt a second prong in its test, limiting joint employer status under the NLRA to a sub-section of the entities it finds to be common law joint employers. *Browning-Ferris* concluded that only the sub-set of common law joint employers that exercise "sufficient control over employees' essential terms and conditions of

employment to permit meaningful collective bargaining" should be deemed joint employers. However, by eliminating the "direct and immediate" control requirement, *Browning-Ferris* removed the certainty that is necessary under the NLRA. The standard it adopted—that the putative joint employer exercise "sufficient" control over the employees "to permit meaningful collective bargaining"—is fatally ambiguous because the Board, almost flippantly, concluded it would leave to another day any explanation of how much control was "sufficient." Employees, unions, businesses—and courts—were left to guess whether the "standard" had been met in any particular case. The Board's failure to provide meaningful guidelines in its "standard" resulted in the D.C. Circuit remanding the decision to the Board with directions to provide "scaffolding" around the nebulous *Browning-Ferris* standard. The "direct and immediate" control requirement of the Board's historical standard needs no further scaffolding.

The Board's proposed rule addresses *Browning-Ferris*'s shortcomings, including those identified by the D.C. Circuit, by ensuring its joint employer standard addresses both the common law *and* the NLRA's concerns. Moreover, it does so in a single, clear standard that all the NLRA's constituents can understand and apply. The proposed rule would ensure that the common law test is met because it ensures an entity will not be deemed a joint employer unless it actually exercises substantial direct and immediate control over essential employment terms. And, while the common law's outer parameters cannot be precisely defined (which is another reason it is a poor guide for the Board to discharge its obligation to foster certainty in the NLRA), they certainly encompass any entity that exercises the control the proposed rule would require. Likewise, the proposed rule addresses the NLRA's concerns by ensuring that entities operating at arms-length using common business models, but not exercising substantial direct and immediate control over another's employees, are not deemed joint employers with those employees' actual employers. Only entities that actually exercise substantial control over another employer's employees should participate in

collective bargaining, because only those entities actually control (or care enough about exercising control over) the essential terms and conditions of employment that are mandatory bargaining subjects. Forcing businesses that have indirect or unexercised retained control into union contract negotiations as joint employers would undermine, rather than improve, the efficacy of collective bargaining. Particularly in initial contract situations, successfully bargaining a collective bargaining agreement is challenging at best; it is often unsuccessful. Adding to those negotiations a party that has little interest in making concessions or establishing long-term relationships because it does not care about actually exercising control over the represented employees is not likely to make those negotiations more successful or beneficial to represented employees. On the contrary, it is likely to frustrate the fundamental purposes of the NLRA.

Businesses today often outsource to independent companies functions that, while necessary to their operations, are not central to their business purpose. Outsourcing janitorial and security services are common examples, but far from the only ones. In addition, many if not most businesses outsource some core services, production, delivery and/or marketing functions that are crucial to their business purpose and the services or products they provide. Still others operate through franchise models, enabling entrepreneurial individuals and small business owners to capitalize on the success already achieved by larger, established companies. In all of these situations, one company, simply due to how their business models function, have certain indirect and/or potential control over the other's employees. That does not mean they are joint employers of the other's employees under the common law, much less, in light of the purpose of the NLRA. *Browning-Ferris* inappropriately allows such indirect and/or potential control to *alone* establish joint employer obligations, limited only by whether a particular regional director or future Board feel that the amount of control in a given case is not "sufficient to permit meaningful collective bargaining." The D.C. Circuit appropriately criticized the Board for failing to recognize the difference between

control inherent in ordinary business situations and the type of control that might be relevant to the NLRA.

2. As the D.C. Circuit Concluded, *Browning-Ferris* Improperly Considered as Probative the Control a Company has over Another's Employees Simply as a Consequence of an Ordinary Business Relationship.

Most of the potential or indirect control factors that the Board deemed indicative of a joint employer relationship are the unavoidable consequence of business relationships were one employer owns and controls the premises where work is performed by another employer's employees. In particular, the Board found significant the fact that Browning-Ferris: (1) owned the facility; (2) maintained certain production and operational policies, which resulted in decisions by Browning-Ferris as to when the lines would start and stop and if the lines would run after hours; (3) required that Leadpoint perform background checks and drug testing on all its employees assigned to work at Leadpoint's operation at Browning-Ferris; and (4) provided Browning-Ferris with the right to reject any Leadpoint employee (though that right was not exercised). Such factors -- as the D.C. Circuit opined -- do not demonstrate control probative of a joint employer relationship because they are operational, production and safety standards inherent in ordinary business relationships and should never be considered under any standard the Board adopts for determining joint-employer status.

Indeed, companies have sound business reasons for establishing operational, production and safety standards in their agreements with suppliers and contractors. The purpose of such standards is not to exert control over the working conditions of contractor's employees. Instead, they are intended to establish and maintain a safe working environment, minimize operational disruptions, ensure that the contractor is performing the job for which it was hired and provide the level of quality or service required by the business.

For instance, if an aircraft manufacturer contracts with a supplier to produce component parts for an engine, the manufacturer must ensure that the part is produced on time and according to detailed specifications. The timeframe and specifications for production established by the manufacturer *(i.e.*, the supplier's customer) should not be evidence of joint employer status. The manufacturer also may want the supplier to certify that it has a drug and alcohol testing program in place to ensure that the workers who are producing the aircraft engine parts are not under the influence of drugs or alcohol while they are performing that work. By requiring that the supplier have a drug and alcohol testing program, the aircraft manufacturer is not seeking to co-determine the terms and conditions of employment of the supplier's employees. The manufacturer is protecting its own legitimate business interests (and often, the safety of its own employees and the public).

Such requirements should not give rise to a joint employer relationship and, in large measure, the D.C. Circuit confirmed that such factors are not probative of joint employer status. The employee's statutory employer remains able to bargain with a representative of its employees about how the requirements will affect them and their work, but the manufacturing company that utilizes their employer's services should not be forced to engage in collective bargaining over these business requirements. *See New York New York Hotel & Casino,* 356 NLRB No. 19, slip op. at 11 (Mar. 25, 2011) (finding rules requiring a contractor's employees to undergo drug testing and prohibiting them from wearing their uniform off-duty and entering the bars inside the employer's hotel were legitimate operational policies designed to ensure that the contractor's employees did not do anything to interfere with the operations of the hotel); *Hychem Constructors, Inc.,* 169 NLRB 274, 276 (1968) ("The promulgation of such rules, which seek to insure safety and security, is a natural concomitant of the right of any property owner or occupant to protect his premises."); December 10, 2018 Comments of the

General Counsel, at 5, *available at* https://dlbjbjzgnk95t.cloudfront.net/1113000/1113358/comment.pdf (last visited January 16, 2018) ("Efforts by a user employer to monitor, evaluate, and improve the performance of supplied employees, as opposed to controlling the manner and means of their performance (and especially the details of that performance), are typical of the relationship between a company and its supplier and should not make the supplier's workers employees of the user employer. The existence of this kind of oversight, therefore, cannot be an appropriate basis for finding that the user employer is a joint employer of its supplier's employees.").

Companies likewise have legitimate business reasons for limiting the costs that they are willing to reimburse under a contract with a supplier or contractor. If the contract is entered into on a cost-plus basis, the business may cap the hourly rate that they are willing to reimburse under that arrangement. For sound and obvious reasons, the business would not want to agree to reimburse the contractor for any and all labor costs associated with performing the contract, regardless of what hourly rate the contractor decides to pay its employees. Such limitations on the labor costs the business is willing to pay do not prevent the contractor from engaging in meaningful collective bargaining. *See Mgm't Training Corp.*, 317 NLRB 1355, 1356 (1995) (finding that meaningful bargaining may occur between a government contractor and a union representing its employees where the government sets the wage rates of its employees); *Cabot Corp.*, 223 NLRB 1388, 1388 (1976) (refusing to find joint employer liability where the cost-plus contract specified wage rates at which the putative employer would reimburse the subcontractor for the wages of its employees).

The Board has held, in numerous cases, that reimbursement rates in cost-plus and government contracts do not preclude the contractor from negotiating higher wages and benefits than are provided for in the contract. *See, e.g.*, *Mgm't Training*, 317 NLRB at 1357; *Ebon*

Research Sys., 302 NLRB 762, 765 (1991); *Dynaelectron Corp., Aerospace Ops. Div.*, 286 NLRB 302, 304 (1987); *Chesapeake Foods*, 287 NLRB 405, 407 (1987). As the Board observed in *Management Training*, the contractor may agree in collective bargaining to pay a rate that is higher than what will be reimbursed and absorb those additional costs or reduce its profit margin on the contract:

> Even if the Government rejects a negotiated wage increase and the employer has to fund the increase out of its own profits, as the Board stated in *Dynaelectron*, 286 NLRB at 304, that burden is no greater than that carried by any contractor operating under a cost-plus-fixed-fee contract. Nor does the fact that the employer has limited economic resources with which to grant the union's requests mean that there is not sufficient room for give and take in the bargaining process; profit margins are frequently narrow.

Mgm't Training, 317 NLRB at 1357.[4]

Thus, according to longstanding and well-established precedent, reimbursement rates and other standards set forth in an agreement with a contractor are not indicia of control that should give rise to a joint employer relationship. The contractor still has the ability to engage in collective bargaining over all terms and conditions of employment, including how the standards imposed by the customer will affect the contractor's employees.

3. Retaining the *Browning-Ferris* Indirect Control Standard Would Discourage Responsible Contracting Policies and Supplier Codes of Conduct.

Some companies impose standards on their contractors and suppliers for reasons of public policy and corporate social responsibility. Labor unions, human rights groups and the

[4] Of course, if the customer is a government entity, then the Board will not have jurisdiction over the customer in those cases and cannot compel the customer to participate in bargaining. *Mgmt. Training*, 317 NLRB at 1358 n.16. Yet, as the Board held in *Management Training*, it is possible for meaningful collective bargaining to occur with the contractor in those cases, even though the Board has no authority to compel the customer to participate in bargaining. *Id.* ("Whether the private employer and the exempt entity are joint employers is irrelevant. The fact that we have no jurisdiction over governmental entities and thus cannot compel them to sit at the bargaining table does not destroy the ability of private employers to engage in effective bargaining over terms and conditions of employment within their control.").

international labor community have urged companies to adopt responsible contracting policies or supplier codes of conduct in order to ensure that the company's suppliers and contractors, both domestically and internationally, adhere to minimum labor standards, provide safe working conditions for their employees and adopt environmentally-friendly practices. *See generally* Eduardo Porter, *Dividends Emerge In Pressing Apple Over Working Conditions in China*, N.Y. Times, Mar. 6, 2012. For instance, the policies may require that suppliers and contractors pay a living wage, accurately pay and report employees' overtime, provide health insurance or other welfare benefits, implement a fire safety plan, prohibit certain materials that are deemed to be harmful to the environment, require updates to facilities, and mandate the use of certain types of safety equipment.

If the Board retains the indirect control standard for joint employer status, companies would run the risk of being found to be a joint employer of their suppliers and contractors if they maintain responsible contractor policies or supplier codes of conduct. Policies such as these certainly affect the working conditions of the supplier's employees, but not because the company wants to become a joint employer of the supplier's employees or play any direct role in the management of their workforce. These policies are adopted for reasons of public policy and corporate social responsibility. The Board should not create a disincentive for companies to adopt policies such as these by reversing longstanding precedent and holding that indirect control is sufficient to establish joint employer status.

4. Retaining the *Browning-Ferris* Indirect Control Standard Would Unnecessarily Expose Companies to Liability for the Unfair Labor Practices of Their Contractors and Suppliers.

If the Board fails to adopt the proposed rule and instead retains the *Browning-Ferris* indirect control standard to determine joint employer status, companies would be exposed to greater liability for unfair labor practices committed by their contractors and suppliers. Joint

employers are generally liable for unfair labor practices committed by the other employer, except where anti-union motivation is an element of the unfair labor practice. *Whitewood Maint. Co.*, 292 NLRB 1159, 1162 (1989), *enf'd sub nom., World Serv. Co. v. NLRB*, 928 F.2d 1426 (5th Cir. 1991).[4] This is true even when the company has little or no actual control over the contractor or its employees, is not in a position to investigate and remedy unlawful actions by the contractor, is not aware of the contractor's actions, and may even affirmatively require that the contractor comply with the law *(e.g.*, through a supplier code of conduct). In *Whitewood*, for example, the Board found that a joint employer was liable for an unlawful interrogation, based solely on its status as a joint employer, without regard to whether the joint employer had knowledge of or participated in the unlawful interrogation. *Whitewood Maint.*, 292 NLRB at 1164.

There is a serious danger that the application of the *Browning-Ferris* indirect control standard would expand a company's potential liability for unfair labor practices committed by a contractor not based on any act or omission by the putative joint employer. Such liability could be imposed solely by virtue of an arms-length contractual relationship with a contractor or supplier. This would be directly contrary to the intent of Congress in amending the definition of "employer" under the LMRA in 1947. At that time, the Board had developed a practice of imputing liability to employers that did not cause, participate in, or know of the commission of certain unfair labor practices. I Leg. Hist. of the LMRA of 1947, 302 (House Report No. 245 at 11). Congress disapproved of the Board's practice and, in 1947, amended the LMRA's definition of "employer" from "any person acting *in the interest* of an employer," to "any person acting as an *agent* of the employer." *Id.* In doing so, Congress specifically stated that its purpose was to end the Board's practice of imputing to employers, statements and actions that the employer "did not do, did not authorize, and had tried to prevent." *Id.*

The Board's historical "direct and immediate" control standard appropriately assigns unfair labor practice liability to the employer responsible for the Act violation. The Board has held that the imputation of liability under this standard is "particularly reasonable" because "each employer is in a position to investigate and remedy unlawful actions." *Capital EMI Music*, 311 NLRB at 1000. Indeed, regardless of what joint employer standard applies, the Act allows the Board to impute liability to any employer that *causes* another employer to commit an unfair labor practice. *See Dews Construction Corp.,* 231 NLRB 182 (1977), *enf'd mem.* 578 F.2d 1374 (3d Cir. 1978).

The Board should adopt the proposed rule to ensure that the scope of liability does not expand beyond what Congress intended, as would likely happen under the current *Browning-Ferris* test.

5. Retaining the *Browning-Ferris* Standard Would Disrupt Existing Contractor and Supplier Relationships, with Adverse Consequences for Millions of Workers.

If the Board fails to adopt the proposed rule and, instead, retains the indirect control standard of *Browning-Ferris*, many companies may (and probably should) elect to terminate relationships with their suppliers and contractors rather than risk being found to be a joint employer for actions they do not control. This would have an adverse impact on the employees of those suppliers and contractors, and could affect the economy as a whole. *See* December 10, 2018 Comments of the General Counsel, at 3 ("The decision in *BFI* has had the effect of disrupting thousands, if not hundreds of thousands, of business relationships, contractual relationships, and, ultimately, bargaining relationships because the new joint employer standard now extends its reach to decades-old business relationships, as well as business partners that have never before been thrust into their customers' or vendors' labor disputes and whose presence in them can only serve to impede the likelihood of their resolution.")

Temporary and contingent jobs are important to the American economy and, as the Board has recognized, have grown substantially in recent decades. Between 1970 and 1992, voluntary part-time employment increased by 53%. Bureau of Labor Statistics, U.S. Dep't of Labor, *US. Dep't of Labor, Employment & Earnings*, at 211 (Jan. 1993). Significantly, since 1982, temporary employment has grown 10 times faster than overall employment. Bureau of Labor Statistics, U.S. Dep't of Labor, *U.S. Dep't of Labor, Employment & Earnings*, at 17 (Mar. 1993) (work force as a whole grew by 21% while employment in "help supply services" grew by 246%).

Temporary work is one area of the job market that expects continued growth and the steady addition of new jobs into the future. In the year 2010, 26.2% of all jobs added by private sector employers were temporary positions. Motoko Rich, *Weighing Costs, Companies Favor Temporary Help*, N.Y. Times (Dec. 19, 2010). The creation of jobs, even temporary jobs, is necessary to the nation's recovery from the recent economic crisis. By one estimate, the U.S. economy must create 21 million new jobs by the end of the decade to reach pre-recession employment levels. McKinsey Global Institute, McKinsey & Company, *An Economy That Works: Job Creation and America's Future* (June 2011). A recent Bureau of Labor Statistics study forecasts that, going forward, the temporary employment industry will add 631,000 temporary jobs each year until reaching 3.3 million jobs by the year 2020. Bureau of Labor Statistics, U.S. Dep't of Labor, *Monthly Labor Review*, at 74 (Jan. 2012). In fact, the report placed the temporary employment industry among those with the "largest projected employment growth." *Id.*

Some proponents of the *Browning-Ferris* standard argue that the loss of temporary or contingent jobs could benefit employees because it may force companies to hire regular, full-time or part-time employees rather than relying on a contractor or temporary agency to supply

labor. However, there is no empirical data to support such prediction. The use of contractors and temporary agencies generates efficiencies that a business may not be able to replicate if it hires employees on a regular full-time or part-time basis. For instance, companies may rely on contractors and temporary agencies to manage unpredictable fluctuations in the business cycle or levels of demand. Companies may not, however, be willing to hire additional employees to meet surges in demand or production, only to lay them off again when demand recedes. Instead, a business may require that its existing employees work additional overtime, perhaps on an involuntary basis, or take other measures to adapt to fluctuations in demand, which could include outsourcing the work to other employers either domestically or overseas.

Thus, the consequences should the Board fail to adopt the proposed rule are significant. The Board should recognize the potential effect the *Browning-Ferris* standard likely will have on the business community, temporary and contingent workers, and the economy as a whole.

6. The Proposed Rule Furthers the NLRA's Purpose of Encouraging Collective Bargaining.

When Congress adopted the NLRA, it made clear its primary purpose was to "encourag[e] the practice and procedure of collective bargaining." 29 U.S.C. § 151. Since then, however, a series of cases that had expanded the NLRA's reach beyond what Congress intended caused Congress to revisit and substantially revise the NLRA Act in ways that directly or practically limited the process of collective bargaining. For example, Congress amended the NLRA to protect employee rights to not engage in collective bargaining or otherwise support unions and made clear that the NLRA's reach was not as extensive as the Board and Court seemed to believe. Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (amending 29 U.S.C. § 157). Another limiting change Congress made through the Taft-Hartley Act was to preclude the Board from certifying a unit based solely on the extent to which a union had been successful in organizing;

instead, the unit must be appropriate for bargaining. 29 U.S.C. § 159(c). Clearly, the purpose of the NLRA today is not merely to encourage collective bargaining for its own sake but, rather, to encourage collective bargaining that can meaningfully address the workplace concerns of a group of an employer's employees that shares a community of interest.

In *Browning-Ferris*, however, the Board failed to recognize the obstacles created by forcing two different businesses to bargain over the terms of employment for a group of employees over which only one of them exercises substantial direct control. Proposed contract terms that might be crucial to one of the joint employers, and for which it might be willing to make significant concessions, might be irrelevant to, or contrary to the interests of, the other. Moreover, some issues that might be significant to the union, and which might be acceptable to the direct employer if negotiating alone, likely will be barriers to any agreement in a joint-employer situation because the direct employer will not agree to be bound to certain terms when its contract with the other joint employer can be terminated on short notice. It belies logic to assume that, simply because unions want to have both businesses at the bargaining table, more effective bargaining will result. Indeed, precisely the opposite is true. *See* December 10, 2018 Comments of the General Counsel, at 5-6 ("One of the key analytical problems in widening the net of who must bargain is that, at some point, agreements will not be achievable because the different parties involuntarily thrown together as negotiators under the BFI test predictably have widely divergent interests. . . . Injecting an additional party into the collective bargaining process with interests that do not align with the co-employer's concerning a critical element of collective bargaining, such as wages, will make achieving agreement much less likely.").

Viewed in practical terms, the Board's *Browning-Ferris* standard is plainly intended to change the way businesses negotiate with one another and structure their relationship, and that standard will inevitably cause that result to a far greater extent than it will facilitate how an

employer and its employees negotiate and order their employment relationship. Congress has made the latter the focus of the NLRA and its regulation the proper function of the Board. Congress, however, in no way has authorized the Board to unnecessarily interfere, impair or invalidate business-to-business relationships.

Another important component of the Taft-Hartley Act amendments was adopting a new prohibition against unions engaging in secondary boycotts. The statutory prohibition and resulting protections are contained in Section 8(b)(4) of the NLRA, as amended. 29 U.S.C. § 158. The NLRA reflects Congress's perspective that employees and unions are entitled to, and will, engage in various activities including handbilling, picketing and striking to influence employers through the economic pressure attendant to such activities. However, Congress has also expressly recognized, in particular by enacting Section 8(b)(4), that the right to exercise such economic leverage is not unlimited, and must be closely regulated. When the immediate target of that economic pressure is the employer with whom the employees have a direct employment relationship and/or a labor dispute, that employer is deemed to be the "primary employer" and the handbilling, picketing and striking is thus, deemed to constitute legitimate primary activity. When, however, the target of the economic pressure is an employer that has a business relationship with the primary employer, that employer is deemed to be a "secondary" or "neutral" employer, and activity is deemed to be "secondary" and outlawed by Section 8(b)(4).

In enacting Section 8(b)(4), Congress made clear that direct, primary activity was legitimate and lawful. It made equally clear, however, that secondary pressure aimed against a neutral employer with the object of causing that employer to adversely alter its business relationship with the primary employer is unlawful. The prohibitions against secondary activity

in Section 8(b)(4) are designed to protect secondary or neutral employers from being enmeshed in the labor disputes of the primary employer.

The expanded joint employer standard under *Browning-Ferris* runs the risk of destroying the concept of "neutrality" by finding the secondary employer to be a joint employer whenever the primary employer is economically dependent on the secondary employer. That would be so even though the secondary employer has no ability or authority to control the employees' terms and conditions of employment or to remedy the union's labor dispute. *See* December 10, 2018 Comments of the General Counsel, at 7 ("BFI's expansion of the joint-employer doctrine swept many more entities into primary-employer status as to labor disputes that are not directly their own. As a result, unions may be permitted to lawfully picket or apply other coercive pressure to either or both joint employers as they chose, even though the targeted joint employer may not have direct control or even any control over the particular terms or conditions of employment that are the subject of the labor dispute."). Under the proposed standard, Section 8(b)(4) would retain its meaning, effect and protections by not expanding the join employer concepts to a secondary employer.

The Board's proposed standard provides clear answers that employees, unions and employers need while ensuring that the appropriate parties – and only the appropriate parties – are at the bargaining table. The Board's proposed rule is the best solution for addressing the D.C. Circuit's criticism.

C. Rulemaking Is The Appropriate Method To Resolve The Confusion Resulting From The Board's Ill-Conceived *Browning-Ferris* Decision.

A common criticism of Board jurisprudence focuses on the pendulum swings in policies that result from the Board's shifts in political control, eroding the deference the Board should be given in applying the NLRA by the courts and constituents. Such pendulum swings with reversals and re-

reversals have become commonplace, despite their disruptive effect and resulting criticism. Uncertainty created by unpredictability and chaos in the law is particularly damaging to the Board's constituents – businesses, labor unions and employees – because they cannot understand their rights obligations at any given time, rendering it impossible for long term planning with any reasonable expectation that they can rely upon a current Board decision as a rule that will be the same four years from now. Furthermore, uncertainly in the law created by reversing thirty years of established precedent without clear evidence of compelling justification works against one of the Board's primary purposes: to ensure stability in labor relations.

In comparison, APA rulemaking provides significant benefits over adjudication, as it ensures "fairness and mature consideration of rules of general application." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 777-79 (1969). The Court's perspective has been frequently echoed by other courts and academics alike. *See, e.g.*, Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Adjudication vs. Rulemaking*, 64 Emory L. J. 1469, 1473 (2015) also found at http://law.emory.edu/elj/content/volume-64/issue-special/panel-i/rulemaking-vs-adjudication.html. One advantage of APA rulemaking is that it applies rules prospectively and gives stakeholders the opportunity to understand when and how they would be liable as joint employers and make necessary adjustments. Rulemaking also allows the Board to develop a more informed standard, as it is not limited to the specific facts and legal issues of one case. Rather, it allows the Board to address different issues and factual scenarios presented in different industries and business relationships and to involve, prepare and educate the public through webinars, FAQs or compliance toolkits, and providing clarity that fact-based adjudication cannot.

Indeed, even the dissent to the NPRM recognizes that rulemaking with public participation is important when the Board is making rules on fundamental aspects of the NLRA that broadly affect stakeholders may often be preferred over case adjudication. The dissent expresses concern

the Board is not holding oral argument on the NPRM – although citing only two examples where it has done so in the past – because of a belief that individuals and small businesses with valuable insight may not be able to afford legal assistance to write a brief. However, that fails to recognize that many groups purporting to represent employees, and trade groups that represent small businesses, are filing comments to express their views, experiences and interests.

Finally, the Board's proposed rule provides an advantage over adjudication that is unique in rulemaking generally, as it would adopt a standard that immediately includes 30-plus years of Board and court development and explanation. The Board's proposed rule would essentially codify the "direct and immediate" standard that, until *Browning-Ferris,* had been settled law for decades. To ensure the broadest participation on such a fundamental question under the NLRA, rulemaking is the most appropriate method for the Board to define what is necessary for an entity to be deemed a "joint employer" under the NLRA. Such transparency and clarity is crucial to COLLE's members, many of which will be required to re-evaluate and likely change their business operations and plans if the Board fails to return to its historical, "direct and immediate" control standard because of the unquantifiable risks posed by the uncertainty of the Board's current test, and exacerbated by the D.C. Circuit's decision. In its straightforward and clearly stated proposed rule, the Board can eliminate the anxiety that exists in the employer community, and further the Board's important purpose of providing stability in labor relations.

IV. CONCLUSION

The rationale that led the Board to adopt a "direct and immediate" control standard three decades ago remains fully applicable today. The Board, recognizing that fact and acting to correct its error, has proposed a return to the "direct and immediate" standard that prevailed prior to *Browning-Ferris*. COLLE commends the Board for its willingness to participate in the rulemaking

process and urges it to adopt quickly and decisively the "direct and immediate" standard in the NPRM.

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